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No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits the annexed brief amicus curiae in support of petitioners, Tahoe-Sierra Preservation Council, *et al.* Written consent to the filing of this brief has been granted by counsel for petitioners. This consent has been lodged with the clerk of this Court.

Consent has been withheld by counsel for respondent, Tahoe Regional Planning Agency.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The per curiam opinion below adds yet another "ripeness" hurdle for property owners seeking redress under the Fifth Amendment's Just Compensation Clause. In holding that a property owner must first seek an amendment to the land use law itself, even in a *facial* challenge, the opinion flouts the precedents of this Court and has created an unequivocal conflict with the decisions of other Circuit Courts.

The opinion also fails to acknowledge the practical effect of its holding. Requesting a government agency to amend a land use ordinance or statute can be enormously expensive, time-consuming, and utterly futile. Under the Ninth Circuit's per curiam opinion, property owners may have the "technical" right to seek just compensation under the Fifth Amendment for overburdensome governmental regulations, but few will have the economic resources and psychological tenacity needed to comply with this new and novel "ripeness" requirement. The public interest supports practical, commonsense limitations on expansions to the increasingly dilatory "ripeness" doctrine.

It is respectfully requested that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: February 26, 1991.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case presents the question of whether the "ripeness" doctrine in the land use context has been stretched beyond its legal and practical limits by the Ninth Circuit's per curiam opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990). *See* Petitioners' Appendix A at 1a.

Petitioner Tahoe-Sierra Preservation Council represents over 300 individuals who own single-family lots on the Nevada side of Lake Tahoe, and who wish to build homes. In 1984, the Tahoe Regional Planning Agency (TRPA) adopted the Regional Plan at issue in this case.[1] The petitioners challenged the express provisions of the Regional Plan as "directly and specifically prohibit[ing] any reasonable, practical, viable, beneficial, or feasible use of thousands of legally-created lots or parcels of privately-owned real property in the Lake Tahoe Basin . . . ." Petitioners' Appendix F at 126a.

The Ninth Circuit dismissed as unripe petitioners' second and fifth causes of action for damages resulting from the regulatory taking of private property without just compensation. The court concluded that petitioners "were required to request that TRPA amend the [Regional] Plan before they filed this action, and that their failure to do so renders unripe their taking

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[1] TRPA was created by the Tahoe Regional Planning Compact between the states of California and Nevada. Pub. L. No. 96-551, 94 Stat. 3233 (1980); Cal. Gov't Code § 66801; Nev. Rev. Stat. § 277.200. *See* Petitioners' Appendix E at 73a.

claims . . . . " *Tahoe-Sierra*, 911 F.2d at 1336. Petitioners' Appendix A at 9a.

The court reasoned that an application for an amendment to the Regional Plan would afford petitioners the opportunity for an "administrative" remedy regarding their plans for development. This "administrative" remedy, the court noted, "offers the same possibility regarding development as does a system for requesting variances." *Id.* The court found no reason to distinguish an application for administrative relief, as required in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), from an application for an amendment to the land use law itself: "Certainly as long as the process is limited and reasonably short in duration, and is guaranteed to culminate in either a 'yes' or a 'no,' we believe the plaintiffs are required to pursue it." *Tahoe-Sierra*, 911 F.2d at 1339. Petitioners' Appendix A at 15a-16a.

SUMMARY OF THE ARGUMENT

The court below has neglected to consider the impact of its new "ripeness" rule on private property owners who, after already expending substantial time and money in an effort to comply with other ripeness requirements, must now leap yet another technical (but costly) hurdle in order to have their day in court. Governmental entities will no doubt adopt new "amendment" procedures for the sole purpose of avoiding and delaying substantive judicial review of land use regulations.

The court also failed to acknowledge the existence of a long line of conflicting court decisions, including decisions by this Court. These decisions hold that the traditional "ripeness" analysis is only relevant to "as-applied" takings claims, as opposed to "facial" claims which contend that the "mere enactment" of the statute or ordinance in and of itself results in a taking. The Ninth Circuit was overly intent on applying the "finality" requirement of *Williamson County* even though that was an "as-applied" case. Here the petitioners are asserting that the Regional Plan on its face caused a taking. As will be shown, the Ninth Circuit's error has resulted in a conflict among the Circuit Courts regarding the applicable ripeness analysis for facial takings claims.

If the decision below is allowed to stand, property owners will have little hope of ever seeing the light at the end of the "ripeness" tunnel. This Court should grant the petition in order to put reasonable limits on the "ripeness" doctrine, and to reaffirm the right of private property owners to obtain judicial review of overburdensome governmental enactments which directly impact the right to make reasonable use of property.

ARGUMENT

I

AS A MATTER OF PUBLIC POLICY, PRIVATE PROPERTY OWNERS SHOULD NOT BE REQUIRED TO APPLY FOR AN AMENDMENT TO THE LAND USE LAW ITSELF BEFORE SEEKING JUDICIAL RELIEF

Within the last decade, the "ripeness" doctrine has become the single most litigated issue in Fifth

Amendment takings cases. A governmental entity which does not assert one of the increasingly long list of available "ripeness" defenses could probably be accused of malpractice.

Lack of precedent notwithstanding, the Ninth Circuit has created yet another technical "ripeness" defense for the benefit of governmental entities: failure of the property owner to seek an amendment to the land use law itself. This new rule, in conjunction with the already burdensome "ripeness" requirements of finality and exhaustion of state compensation procedures, transforms the Fifth Amendment's just compensation mandate into a theoretical pipe dream for private property owners.

There are several reasons why this new "ripeness" requirement will have significant impacts on private property owners—impacts which were not even considered by the Ninth Circuit. First, land use applications can carry hefty price tags. Some cities and counties charge thousands of dollars in fees just for the privilege of asking for an amendment to the land use law.

Second, the cost of developing the information needed to support an application to amend a land use statute or ordinance can be enormous. Most general land use laws in California (called "general plans") consist of hundreds of pages of detailed policy and environmental analysis prepared by professional land use planners and funded by tax dollars. California actually requires all general plans to contain a number of mandatory elements, including the impact of land use designations on housing, conservation, noise, safety, open space, and

transportation.[2] A general plan amendment application, which would now be required by the Ninth Circuit's decision, would likewise have to address these mandatory elements. Private property owners, the majority of whom are middle-class families on fixed budgets, should not be required to hire environmental consultants and experts at astronomical fees in order to "formally" request an amendment to a land use law.

If the property owner's amendment application did not include this type of detailed policy and environmental analysis, what would prevent a governmental entity from refusing to even *consider* the application? If the application were deemed incomplete for this reason, the property owner would *never* be able to seek just compensation for a regulatory taking because the case would never be ripe.

The substantial amount of time it would take to submit a complete amendment application also raises statute of limitations problems. In the present case, the property owners were faced with a 60-day statute of limitations to initiate litigation "arising out of the adoption or amendment of the regional plan" as provided in Art. VI(j)(4) of the California-Nevada Compact. Petitioners' Appendix E at 105a. *See also* Brief of Petitioners at n.17. It would be virtually impossible to gather the necessary information for an amendment application in such a short period of time, especially in California, where it often takes *years* for cities and counties to amend their general plans.

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[2] *See* Cal. Gov't Code § 65302.

Finally, some local agencies in California have adopted ordinances which require *voter approval* for any amendment to the general plan. Property owners who request such amendments are thus required to personally pay for the cost of special elections. One such ordinance was recently adopted, by initiative, in Monterey, California. Property owners in these cities must now pay for a special election before their Fifth Amendment just compensation claims will be ripe for judicial review.

These practical, commonsense concerns were completely ignored by the Ninth Circuit, which focused solely on the fact that "TRPA specifically invites amendment proposals and promises action on them within a reasonable time." *Tahoe-Sierra*, 911 F.2d at 1337. Petitioners' Appendix A at 10a.[3]

This simplistic, rigid view of the land use legislative process fails to recognize the due process rights of property owners. Perhaps this was due to an inherent belief that the constitutional rights of property owners are of collateral importance. The Ninth Circuit said: "Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third." *Tahoe-Sierra*, 911 F.2d at 1338 n.5. Petitioners' Appendix A at 13a. But as observed in Judge Kozinski's dissent, this view reflects a "thinly disguised

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[3] In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court required courts to "evaluate both the fitness of the issues for judicial decision and the *hardship to the parties* of withholding court consideration" when addressing ripeness issues. *Id.* at 149 (emphasis added).

contempt" for constitutionally protected property rights. In any event, the reasoning of Judge Kozinski's dissent regarding the necessity of a new "ripeness" hurdle, in and of itself, demonstrates great need for review by this Court.

II

THE NINTH CIRCUIT'S NEW "RIPENESS" RULE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

Aside from the public policy concerns discussed above, the Ninth Circuit's per curiam opinion conflicts with the well-established precedents of this Court and other Circuit Courts. In a line of cases stretching from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), this Court has consistently addressed the merits of "facial" takings challenges without applying the traditional "as-applied" ripeness test.

The *Keystone* Court, quoting *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 294-96 (1981), emphasized the distinction between these two types of claims:

> " 'Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the [Surface Mining Control and Reclamation] Act to particular surface mining operations or its effect on specific parcels of land. Thus, *the only issue properly before . . . this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking.* [Quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)]. The

> test to be applied in considering this *facial challenge* is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . . " ' " 480 U.S. at 495 (emphasis added).

As in *Keystone*, petitioners are not challenging the application of specific provisions of the TRPA Regional Plan. Rather, they are claiming that the mere *enactment* of the Regional Plan constitutes a taking because it forbids all economically viable use of land *by its very terms*. This is precisely the type of claim which the *Keystone* Court addressed, on its merits, without reference to the traditional "ripeness" analysis.[4]

If the enactment of a regulation results in a taking, that regulation "necessarily implicates the 'constitutional obligation to pay just compensation.' " *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (citation omitted). The governmental agency, if it chooses, can then amend or repeal the

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[4] Even if petitioners were pursuing an "as-applied" challenge to the Regional Plan, the Ninth Circuit's opinion would conflict with *Williamson County*, 473 U.S. at 172. In that case, this Court held that an "as applied" takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the *application of the regulations* to the property at issue." *Id.* at 186 (emphasis added).

There is a substantial difference between requesting relief from the application of a regulation, usually by means of a variance, and requesting an amendment to the regulation itself. The former is a request for administrative relief, as required by *Williamson County*, while the latter is a request for legislative relief.

intrusive regulation. *Id.* at 321. This converts the taking to a temporary or lesser one. *Id.* at 317-18. Nevertheless a taking necessarily results and no case suggests that a property owner, to obtain compensation, must first formally ask the governmental agency to amend or repeal the regulation. As *First Church* recognized, the Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315 (emphasis in original). The rationale underlying the Ninth Circuit's per curiam opinion—a rationale which requires affected property owners to beseech the governmental agency to amend or repeal its intrusive regulation as a condition to compensation—totally fails to mesh with the concepts so clearly articulated by this Court in *First Church.*

The opinion below also conflicts with the holdings of a number of Circuit Courts, including the Ninth Circuit. These decisions are all discussed in detail in the Petition for Writ of Certiorari. What is especially significant about these decisions is the fact that they *uniformly* recognize the inapplicability of the traditional ripeness analysis to "facial" takings claims.

CONCLUSION

The "ripeness" doctrine should not be fashioned into an instrument for the dilatory aims of governmental entities. Nor should private property owners be subjected to a Kafkaesque maze of technical, expensive, and ultimately futile procedures in order to secure judicial review

of overburdensome governmental regulations. Contrary to the opinion of the court below, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972).

In the interest of uniformity of law and the preservation of basic property rights, it is respectfully submitted that the petition for writ of certiorari be granted.

DATED: February, 1991.

Respectfully submitted,

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